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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~432~~. 202

THE NEW ORLEANS AND OHIO RAILROAD COMPANY, L. S. TRIMBLE, ET AL., APPELLANTS,

vs.

W. P. MELLEN, TRUSTEE, AND THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED MARCH 14, 1870.

3.

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INDEX.

	Original.	Print.
Bill	1	1
Subpœna	16	5
Mortgages referred to in bill	19	6
Bond to United States	35	12
Amended bill	40	13
Answer of L. S. Trimble	46	15
Answer of W. F. Norton	47	16
Answer of New Orleans and Ohio railroad	49	17
Answer of R. and H. Enders	52	18
Answer of Warren and James Thornberry	53	18
Decree	55	19
United States marshal's report	63	21
Agreement	64	22
Marshal's report	67	23
Agreement No. 2	71	24
Order referring case to special commissioner	72	24
Order confirming sale, &c	73	25
Order adjudging the United States to have superior equity	74	25
Appeal	75	26
Bond	76	26
Deed of marshal to Norton	79	27
Clerk's certificate	84	28

the president of said company duly acknowledged before the clerk of the McCracken County court, Kentucky, and a copy of which, from said clerk's office, is now exhibited and herewith filed as part this bill, marked "A."

Your orators will further state that said New Orleans and Ohio Railroad Company sold and negotiated in the different markets, and to the different persons in the country, their aforesaid bonds; whether the entire amount of two hundred thousand dollars of said bonds was sold by said company, your orators do not certainly know, but the larger portion of the same, at least, your orators charge were negotiated, and they here call upon said New Orleans and Ohio Railroad Company to answer and disclose to the court what amount or proportion of said two hundred thousand dollars of bonds aforesaid has been negotiated and sold by said railroad company, giving a description of the same by
5 their numbers, and also disclose, if known to said company, who are the present owners of said negotiated bonds at this time.

Your orators will further state that Lynn Boyd, the trustee named in said mortgage, departed this life in the year 1859, and said New Orleans & Ohio Railroad Company, through their president and directors, appointed L. S. Trimble, trustee, in the room and stead of Lynn Boyd, deceased, who is now the successor of said Lynn Boyd, as will more fully appear by copy of proceedings of the New Orleans and Ohio Railroad Company through the president and directors of said company, which will be filed and exhibited as part this bill, marked "C," if the same can be procured from the records of said company, which appointment of Trimble as trustee was in pursuance to the power of appointment given in said mortgage.

Your orators will further state that by virtue of an act passed by legislature of Kentucky, amendatory of the charter of said New Orleans & Ohio Railroad Company, approved on the 20th day of Jan-
6 uary, 1860, the said New Orleans & Ohio Railroad Company, to raise an additional sum of money, not exceeding two hundred thousand dollars, were empowered to execute a second deed of mortgage on said railroad, its property, &c., and issue that amount of second-mortgage bonds of said company, for the purpose of completing said road, and for that purpose were empowered to execute, sell, and transfer bonds of said company in sums of one thousand dollars each, with coupons, all of even date, April 1st, 1860, and with interest on each bond at the rate of seven per cent. per annum, the bonds, coupons attached to the one-thousand-dollar bonds, payable at the Bank of America, at the city of New York, all of said bonds made due and payable on the first day of April, 1875, to D. A. Given, or bearer, and the coupons on the first day of April and October in each year all of which bonds, with coupons aforesaid attached, said railroad company did issue and deliver, due and payable as aforesaid, and were sold and nego-
7 tiated by said railroad company for the purpose of raising money; and in order to secure the prompt payment of said railroad bonds and coupons, said New Orleans and Ohio Railroad Company, by virtue of the power vested in them under said act of the Kentucky legislature, on the first day of April, in the year one thousand eight hundred and sixty, executed and delivered to W'm F. Norton, trustee, a deed of mortgage upon the said New Orleans and Ohio railroad, lying between its respective termini, constructed and to be constructed, together with all and singular its franchises, the railways, rails, bridges, fences, warehouses, fixtures, privileges, right of road-bed, right of way, real estate, engines, cars, machinery, and all other property owned by said railroad

company, which mortgage was duly acknowledged before the McCracken County court clerk, by J. Campbell, president of said company, and recorded in said clerk's office, a certified copy of which from said clerk's office is now exhibited and filed as part of this bill.

Your orators further state that they do not know whether the
8 New Orleans & Ohio Railroad Company have issued and sold the bonds of said company, secured by this second mortgage to the full amount of two hundred thousand dollars, or not; they here call upon said New Orleans & Ohio Railroad Company to answer, and disclose to the court, whether they have sold that amount or not, or to what extent or amount said company has negotiated of said two hundred thousand dollars of said second-mortgage bonds, and also, to the extent of their knowledge, disclose who are the owners and holders of said negotiated bonds.

Your orators will further state that W. F. Norton, the trustee named in said second mortgage, on the day of September, 1866, tendered his resignation of his trusteeship to the president and directors of said railroad company, who, by resolution of their board, accepted his resignation, and afterwards, on the 14th day of September, 1866, in pursuance of the powers vested in them under the provision of said deed of mortgage, appointed L. S. Trimble trustee, in the room and stead of said Norton, resigned, who on the 1st day of May, 1867, accepted said
9 trust, and is now the successor of said Norton; all of which will more fully appear by copy of proceeding of said board of directors, which will be filed as part this bill, marked "D," if the same can be procured from the New Orleans & Ohio Railroad Company.

Your orators will further state that, on the first day of October, 1867, Warren Thornberry stood justly indebted to the United States in the sum of forty-four thousand seven hundred and seventy-three $\frac{35}{100}$ dollars and interest, and to cover which on that day he drew his check, as late surveyor of the port of delivery at Paducah, in favor of the United States, upon Watts, Given & Co., at Paducah, and delivered it to your orator, W'm P. Mellen, trustee for the United States, which check was duly presented at the place of payment to Watts, Given & Co., and payment thereof was refused, of which said Warren Thornberry was duly notified; which sum of money is yet due the United States, and wholly unpaid, except the sum of two thousand four hundred & forty-seven $\frac{52}{100}$ dollars, cash payment on sale warehouse. The said check is
10 herewith exhibited, and filed as part this bill. And for the purpose of securing the payment of the same said Warren Thornberry, on the first day of October, 1867, executed to your orator, William P. Mellen, trustee for the United States, a deed of mortgage upon different tracts and lots of land lying in McCracken County, Kentucky, more fully described in said mortgage, which was duly acknowledged and recorded in the county clerk's office of said county, a copy of which is now exhibited, and filed as a part of this bill.

Your orators will further state that on the same day (first of October, 1867) said Warren Thornberry was the holder and owner of the following described bonds, some being of the first-mortgage bonds, and some of the second-mortgage bonds, of the New Orleans and Ohio Railroad Company aforesaid, to wit: He was holder and owner of eight first-mortgage bonds on the New Orleans and Ohio Railroad Company, each for one thousand dollars, due on the first day of July, 1867, and numbered
9, 12, 14, 18, 141, 142, 143, & 144, signed by James Campbell,
11 president, and attested by J. Wyatt Jones, secretary, with no coupons attached to said bonds; also twelve other first-mortgage

bonds on the New Orleans & Ohio Railroad Company of one thousand dollars each, due on the first day of July, 1867, and numbered 2, 122, 123, 124, 125, 126, 129, 130, 131, 132, 133, & 134, all signed by James Campbell, president, and attested by J. Wyatt Jones, secretary, with seven coupons attached to each bond of thirty-five dollars each, making eighty-four coupons, in all amounting to two thousand nine hundred and forty dollars, all of which said first-mortgage bonds had been negotiated by said railroad company, and, with the coupons annexed, are secured, and the payment thereof, by said first mortgage, executed by said railroad company, all of which bonds and coupons are now exhibited, and made part of this bill, marked "E."

Your orators state said Warren Thornberry, on the day and year last aforesaid, was the holder and owner of seven second-mortgage bonds on the New Orleans & Ohio Railroad Company, due on the first day
12 of April, 1875, and numbered 61, 62, 63, 64, 65, 66, & 122, of one thousand dollars each, together with one hundred and twelve coupons attached of thirty-five dollars each, making, in all, three thousand & nine hundred and twenty dollars in coupons, of which number seven coupons were due on the first day of October, 1867; also said Thornberry was owner and holder of six other second-mortgage bonds on the New Orleans & Ohio Railroad Company, of one thousand dollars each, due on the first day of April, 1875, and numbered 27, 28, 74, 92, 135, & 136, all signed by James Campbell, president, and attested by J. Wyatt Jones, secretary, with one hundred and thirty-five coupons attached, of thirty-five dollars each, making four thousand seven hundred and twenty-five dollars in coupons, of which number forty-five coupons are now due, amounting to one thousand five hundred and seventy-five dollars, all of which said second-mortgage bonds had been negotiated by said railroad company, and the same, with the interest thereon, are secured by mortgage made by said New Orleans & Ohio Railroad Company to W'm F. Norton aforesaid.

13 Your orators will further state that, on the first day of October, 1867, said Warren Thornberry transferred and delivered to your orator, William P. Mellen, trustee for the United States, all of the aforesaid first and second mortgage bonds upon the New Orleans and Ohio Railroad Company, as per writing of transfer of that date, are now exhibited and filed as part of this bill, marked "F," for the purposes as in said writing shown, the same being in the nature of a mortgage.

Your orators will further state that James W. Thornberry is the holder and owner of a large amount or number of first-mortgage bonds upon the New Orleans and Ohio Railroad Company; and W'm F. Norton, Rob't Enders, Henry Enders, L. M. Flournoy, L. S. Trimble are, respectively, as your orators are informed and believe, holders and owners of bonds embraced in the first and second mortgage upon the New Orleans and Ohio Railroad Company, secured by said first and second mortgage. How many of said bonds they own your orators do not know, but call upon said named persons to answer and declare to the court the number and amount of each.

14 Your orators state that your orator W'm P. Mellen is a citizen and resident of the State of New York; they make defendants to this bill, the New Orleans and Ohio Railroad Company, L. S. Trimble, trustee, W. F. Norton, Warren Thornberry, James W. Thornberry, Rob't Enders, Henry Enders, L. M. Flournoy, and L. S. Trimble, who are citizens of the State of Kentucky, and they pray for writs of subpœna against them, that they answer, and your orators say they have, and pray to enforce their lien under said mortgage property for the payment

of their said bonds and coupons; that said mortgages be foreclosed, and the defendants'—New Orleans & Ohio Railroad Company's—equity of redemption be barred, and that said New Orleans and Ohio railroad and all the property & franchises embraced in the mortgages aforesaid be sold for the satisfaction of all the bonds secured by said mortgage, and the coupons attached to said bonds. And also your orators pray that the mortgage executed by Warren Thornberry to your orator William P. Mellen, trustee, upon mortgage bonds and coupons aforesaid
15 be also foreclosed, and your orators be substituted to all the rights of the said Warren Thornberry under said two mortgages made by the New Orleans & Ohio Railroad Company, for the benefit of bondholders aforesaid, and t' at the equity of redemption of the said Warren Thornberry in and to the mortgaged bonds and coupons be foreclosed and barred; and your orators pray that all of said mortgages be foreclosed, for a decree for the sums of money due your orators, and for all such orders and decrees as in equity should be rendered, and for all general relief; &, as in duty bound, will every pray, &c.

(Signed) WILLIAM P. MELLEN,
Trustee United States,
Per L. D. HUSBANDS, *Att'y.*

THE UNITED STATES OF AMERICA,
District of Kentucky:

I, Tho's J. Pickett, clerk of the circuit court of the United States for the district aforesaid, do certify that this day personally appeared before me W'm P. Mellen, and made oath, in due form of law, that the allegations made in the foregoing bill, so far as made from his
16 own knowledge, are true, and so far as made from the information of others, he believes the same are true.

Given under my hand this Feb'y 10, 1868.

T. J. PICKETT, *Clk.*

And upon which the following processes or subpœnas issued:

The United States of America to the marshal of the District of Columbia, greeting:

You are hereby commanded to summon the New Orleans & Ohio Railroad Company, L. S. Trimble, trustee, W. F. Norton, Warren Thornberry, James W. Thornberry, Rob't Enders, Henry Enders, L. S. Trimble, & L. M. Flournoy to appear before our circuit court of the United States of America, of the District of Kentucky, at the federal court-hall, in the city of Paducah, on the 3rd Monday in March next, to answer a bill in equity exhibited against them in our said court, by the United States and W. P. Mellen, trustee for the United States, which the shall in no wise omit, under the penalty of four hundred dollars. And have you then there this writ.

17 In testimony whereof Salmon P. Chase, esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court, in Paducah, this 10th day of February, A. D. 1868, and in the ninety-third year of our independence.

[SEAL.] Attest: T. J. PICKETT, *C. C. C. K. D.*,
By HENRY C. YEISER, *his Deputy.*

Upon which is made the following return:

I hereby certify that I served a copy of the within subpœna on L. S.

Trimble, trustee, & L. S. Trimble, def'ts, this 26th day of February, 1868, in person.

D. S. GOODING, *U. S. Marshal D. C.*

And

The United States of America to the marshal of the Kentucky district, greeting:

You are hereby commanded to summon the New Orleans & Ohio Railroad Company, W. F. Norton, Warren Thornberry, James
18 W. Thornberry, Rob't Enders, Henry Enders, & L. M. Flournoy, to appear before our circuit court of the United States of America, of the district of Kentucky, at the federal court-hall, in the city of Paducah, on the 3 Monday in March next, to answer a bill in equity exhibited against them in our said court by the United States and Wm. P. Mellen, trustee for the United States; which them shall in no wise omit, under the penalty of four hundred dollars. And have you then there this writ.

In testimony whereof Salmon P. Chase, esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court, in Paducah, this 24th day of February, A. D. 1868, and in the ninety-third year of our independence.

[SEAL.] Attest: T. J. PICKETT, *C. C. C. K. D.*,
By HENRY C. YEISER, *his Deputy.*

19 Upon which is made the following return:

Executed by delivering a copy of the within to Tho's Baker, sec't'y of N. O. & O. R. R. Co.; W. F. Norton, Warren Thornberry, James W. Thornberry, Rob't Enders, & Henry Enders.

Febr'y 27th, 29th, & Mar. 1st, 1868.

W. O. NONES, *Deputy*,
For W. A. MERIWETHER, *U. S. M. K. D.*

The two mortgages, exhibits referred to in the bill of complainants, (which should have been recorded immediately thereafter,) are as follows:

Exhibit A.

This indenture, made this 22nd day of March, in the year one thousand eight hundred and fifty-eight, between the [the] New Orleans & Ohio Railroad Company, of the first part, & Linn Boyd, of the county of McCracken, State of Kentucky, of the second part, witnesseth: Whereas said New Orleans & Ohio Railroad Company, in pursuance of the authority vested by law, have surveyed & located a line of railroad from the city of Paducah to the Tennessee & Kentucky State line to the junction with the Mobile & Ohio railroad, in the State of Tennessee, & secured the right of way, obtained depot grounds and valuable
20 assets, all of which are of record in the records of the company, & of record in the counties interested, & a large portion of said road is in operation, and the other portion in process of completion. The said New Orleans & Ohio Railroad Company, by vote of the directors, & with the consent & authority of the Mobile & Ohio Railroad Company, resolved by vote of the board of directors, & in pursuance of

the power & authority in said New Orleans & Ohio Railroad Company vested, to raise a sum of money not exceeding two hundred thousand dollars, for the purpose of completing said road, to wit, in the graduation, purchase of iron, the laying of the same, and equipments, and for that purpose to execute and sell & transfer bonds of said company in sums of one hundred dollars each, & bonds in the sums of one thousand dollars each, with coupons, all of even date, January 1st, 1858, & with interest on each bond at the rate of seven per cent. per annum, the bonds and coupons attached to the one-hundred-dollar bonds, payable at the Commercial Bank of Kentucky, in the city of Paducah, and the bonds of one thousand dollars, payable at the Bank of America, in the city of New York. All of said bonds are due & payable on the
21 first day of July, in the year one thousand eight hundred & sixty-seven, to R. C. Williams, or bearer, and the coupons are payable on the first day of July & January in each year. Now, for the purpose of securing the payment of said bonds and the interest on the same as it may become due and payable, the bonds of one hundred dollars each, being numbered respectively from one to 500, and the bonds of the denomination of one thousand dollars each, being numbered respectively from one to one hundred & fifty, & for the further consideration of five dollars to said New Orleans & Ohio Railroad Company, well & truly paid by the said Linn Boyd, at & before the ensealing of these presents, the receipt of which is hereby acknowledged, the said New Orleans & Ohio Railroad Company, party of the first part, have granted, transferred, set over, & conveyed, & by these presents doth grant, transfer, and set over & convey, unto said Linn Boyd, the successor or successors of him, in fee-simple, all & singular of the rights & privileges of every kind & name, as hereinafter set forth, being the first and only conveyance of title, grant, or mortgage, hereby guaranteeing & warrant-
22 ing the described items, assets, & real estate free from all liens and incumbrances done or suffered to be done by the said party of the first part. The said items as set forth are as follows: All the said New Orleans & Ohio railroad lying between its respective termini, constructed & to be constructed, together with all and singular its franchises, the railways, rails, bridges, fences, warehouses, fixtures, privileges, rights, road-bed, right of way, real estate, engines, cars, machinery, & all other property owned. To have & to hold the said premises & property herein set forth to the said Linn Boyd, his successor or successors, for the benefit, security, or advantage for the person or persons, or corporations, or any other party who shall or may be holders of the before-described bonds, or any of them, conditioned as follows: The said Linn Boyd shall, on the failure of said company, the party of the first part, to do & perform all the covenants herein agreed, and to pay or cause to be paid the respective coupons attached to said bonds as they respectively fall due and payable, & to pay said bond when they are due and payable, or his successor or successors, upon the request in writing of any one or more of the bondholders, take actual possession of all of said railroad & other property & effects of said company,
23 the party of the first part, hereby conveyed, transferred, and assigned, or intended to be; &, through the agency of such person or persons as he may from time to time appoint, may receive & collect the tolls, incomes, and profits of the same for the purpose of the security hereinbefore declared; and may sell and dispose of said road & other property hereby mortgaged, conveyed, or assigned, or so intended to be, all benefit & equity of redemption of the said company therein, always

with the benefit of franchise & subject to the conditions thereof, at public auction, giving reasonable public notice of the time & place of sale; & as the attorney of the said company, party of the first part, for that purposes by these presents duly constituted, to make & deliver to the purchaser or purchasers thereof good & sufficient deed or deeds of conveyance for the same, & for the real estate in fee-simple, or otherwise, according to the title of said company therein, & good & proper transfers and assignments of the personal property; & out of the money arising from the income of profits of the said road & other mortgaged, conveyed, or assigned property or effects of the sale thereof, after deducting the expenses incurred in carrying on the business of the road,
and in keeping the same in repair, together with all the costs,
24 charges, and council fees incurred in his proceeding, and a reasonable compensation to him for his services in case of such sale, to apply so much of the residue as may be necessary to pay the principal and interest which may be due on said bonds issued as aforesaid, rendering the balance of said moneys, if any shall remain, to said company, the parties of the first part; and the sale so made shall be a perpetual bar against the parties of the first part & persons claiming by, through, or under them: Provided, however, & it is expressly understood & agreed, that the said Linn Boyd, or his successor or successors, nor either of them, shall in any manner be liable or responsible for any act either to which he is not expressly assenting; and that he, the said Linn Boyd, his successor or successors, shall be accountable only for exercise of reasonable care and diligence in the management in the premises. And it is further covenanted and agreed between the said parties, that if the said Linn Boyd shall hereafter die, or become from any cause incapable of acting in the premises, or resign his office under these presents, then the said company, party of the first part, and the judge of
the circuit court of McCracken County, Kentucky, or either of
25 them, may select some other person to fill the vacancy occasioned or occurring, and shall thereafter make, execute, and deliver all and singular such other & further investments or assurances as may be necessary to enable such person or persons, so selected, to act in the execution of these presents; and it is expressly understood that the conveyance made by this indenture is on & for the present rights, interests, and property, and in the future acquired personal property, rights, & appurtenances of the party of the first part. It is agreed that said company, party of the first part, shall remain in the possession and control and use of said road, and the property herein conveyed, except the said company, party of the first part, become in default for the payment on said bonds or interest on any portion thereof. The New Orleans & Ohio Railroad Company further covenants and agree to make to said Linn Boyd, party of the second part, his successor or successors, and for the assurance or conveyance or instrument in writing, as may be necessary at any future time to carry out the equitable intention of this deed.
And it is hereby further provided and agreed these presents are
26 upon the express condition that upon the payment or satisfaction of the principal and interest of the aforementioned bonds, the estate hereby granted & conveyed to said Linn Boyd, his successor or successors, and the property and effects mortgaged, conveyed, or transferred to him, shall cease & become void, and the said company shall therefore be fully and immediately reinvested with the same, both in law & equity, and in fact.

In virtue whereof the parties of the first part have caused these

presents to be acknowledged by their president and secretary, and their common seal thereto affixed the day & year first above written.

The New Orleans & Ohio Railroad Company,
[SEAL.] By J. CAMPBELL, *President.*,

Attest: G. F. RABB, *Secretary.*

STATE OF KENTUCKY, *McCracken County, set:*

I, Braxton Small, clerk of the county court for the county aforesaid, do certify that the foregoing mortgage from the New Orleans & Ohio Railroad Company to Linn Boyd was this day produced to me in my office, & acknowledged by J. Campbell, president, to be the act & deed of said New Orleans & Ohio Railroad Company, & also acknowledged that he caused the same to be countersigned by G. F. Rabb,
27 secretary of said company; that the seal thereto affixed is the common & corporate seal of said company; and that the said mortgage signed, & the seal thereto affixed by him as president, by order and authority of said company. And the copy of a resolution of the New Orleans & Ohio Railroad Company, signed J. Campbell, president, & attested by G. F. Rabb, secretary, was at the same time, & in like manner, acknowledged before me by said J. Campbell, president, & filed for record. Whereupon I have admitted the same, together with this certificate, to record in my office.

Given under my hand this 26th day of March, 1858.

B. SMALL, *C. McC. C.*

A copy. Attest:

J. SPENCE, *C. McC. C.*,
By J. L. M. HUSBANDS, *D. C.*

2nd exhibit.

This indenture, made this first day of April, in the year one thousand eight hundred and sixty, between the New Orleans & Ohio Railroad Company, of the first part, & William F. Norton, of the county of McCracken, & State of Kentucky, of the second part, witnesseth:

Whereas the said New Orleans & Ohio Railroad Company, in pursuance of the authority vested by law, have surveyed & located a line of said road from the city of Paducah to the Tennessee & Kentucky
28 State line to the junction of the Mobile & Ohio railroad, in the State of Tennessee, and secured the right of way, obtained depot grounds & valuable assets, all of which are of record on the records of the company, & of record in the counties interested, & a large portion of said road is in operation, & the other portion in process of completion, the said New Orleans & Ohio Railroad Company, by vote of the directors of said company, resolved, and in pursuance of the power & authority in said New Orleans & Ohio Railroad Company vested by an act of the legislature of Kentucky, approved January 20th, 1860, entitled "An act to amend the charter of the New Orleans & Ohio Rail. Company," to raise an additional sum of money, not exceeding two hundred thousand dollars, by executing a second deed of mortgage on said railroad, its property, &c., & issue that amount of second-mortgage bonds of said company, for the purpose of completing said road, to wit, in the graduation, purchase of iron, the laying of the same, & equipments, & for that purpose to execute, & sell, & transfer bonds of the said company in sums of one thousand dollars each, with coupons, all of even date, April 1st, 1860, & with interest on each bond at the rate of seven per cent.
29 per annum, the bonds & coupons attached to the one thousand-

dollar bonds payable at the Bank of America, in the city of New York; all of said bonds are due & payable on the 1st day of April, one thousand eight hundred & seventy five, to D. A. Given, or bearer, & the coupons on the first day of April & October in each year:

Now, for the purpose of securing the payment of said bonds, and the interest on the same, as it may become due and payable, the bonds being numbered respectively from one to two hundred, & for the further consideration of five dollars to said New Orleans & Ohio Railroad Company well & truly paid by the said W'm F. Norton, at & before the ensealing of these presents, the receipt of which is hereby acknowledged, the said New Orleans & Ohio Railroad Company, party of the first part, have granted, transferred, set over, and conveyed, and by these presents doth grant, transfer, set over, & convey, unto the said Wm. F. Norton, the successor or sucessors of him, in fee-simple, all and singular of the rights & privileges, of every kind & name, hereinafter set forth, hereby guaranteeing & warranting the described items, assets, & real estate free from all liens or encumbrances done or suffered to be done by the said party of the first part, except a mortgage heretofore executed,
30 of date March 22nd, 1858, for the sum of two hundred thousand dollars. The said items as set forth are as follows: All the said New Orleans & Ohio railroad lying between its respective termini, constructed & to be constructed, together with all & singular the franchises, the railways, rails, bridges, fences, warehouses, fixtures, privileges, rights, road-bed, right of way, real estate, engines, cars, machines, & all other property owned. To have & to hold the said premises and property herein set forth to the said William F. Norton, his successor or successors, for the benefit, security, & advantage of the person or persons, or corporations, or any other party who shall or may be holders of the before-described bonds, or any of them, subject, however, to the said first deed of mortgage, dated March 22, 1858, conditioned as follows:

The said W'm F. Norton shall, on the failure of said company, the party of the first part, to do & perform all the covenants herein agreed, & to pay, or cause to be paid, the respective coupons attached to said bonds as they respectively fall due & payable, & to pay said bonds when they are due & payable, or his successor or successors, upon the
31 request in writing of any one or more of the bondholders, take actual possession of all said railroad & other property and effects of said company, the party of the first part, hereby conveyed, transferred, & assigned, or is intended to be; or, through the agency of such person or persons as he may from time to time appoint, may receive & collect the tolls, incomes, & profits of the same, for the purposes of the security hereinbefore declared; & may sell & dispose of said road & other property hereby mortgaged, conveyed, or assigned, or so intended to be, all benefit & equity of redemption of the said company therein, always with the benefit of franchise, & subject to the condition thereof, at public auction, giving reasonable public notice of the time & place of sale; and as the attorney of the said company, party of the first part, for that purpose by these presents duly constituted, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance for the same, and for the real estate in fee-simple, or otherwise, according to the title of said company therein, & good & proper transfers and assignments of the personal property; & out of the money
32 arising from the income of profits of the said road and other mortgaged, conveyed, or assigned property, or effects of the sale thereof, after deducting the expenses incurred in carrying on the business of the road & in keeping the same in repair, together with the

costs, charges, and council fees incurred in his proceeding, and a reasonable compensation to him for his services in case, of such, to apply so much of the residue as may be necessary to pay the principal & interest which may be due on said bonds issued as aforesaid, rendering the balance of said moneys, if any shall remain, to said company, the parties of the first part; and the sale so made shall be a perpetual bar against the said parties of the first part & persons claiming by, through, or under them; provided, however, and it is hereby expressly understood & agreed, that the said W'm F. Norton, or his successor or successors, nor either of them, shall in any manner be liable or responsible for any act of either to which he is not expressly assenting; and that he, said W. F. Norton, his successor or successors, shall be accountable only for exercise of reasonable care & diligence in the management in
33 the premises. & it is further covenant & agreed between the said parties, that if the said W'm F. Norton shall hereafter die, or become, from any cause, incapable of acting in the premises, or resign his office under these presents, then the said company, party of the first part, and the judge of the circuit court of McCracken County, Kentucky, or either of them, may select some person to fill the vacancy occasioned or occurring, & shall thereafter make, execute, & deliver all and singular such other & further instruments or assurances as may be necessary to enable such person or persons, so selected, to act in the execution of these presents; & it is expressly understood that the conveyance made by this indenture is on & for the presents, rights, interest, and property, & in the future acquired personal property, rights, and appurtenances of the party of the first part. It is agreed that said company, party of the first part, shall remain in the possession, control, & use of said road, & the property herein conveyed, except the said company, party of the first part, become in default for the payment of said bonds or interest in any portion thereof. The New Orleans & Ohio Rail-
34 road Company further covenant & agree to make to the said W'm F. Norton, party of the second part, his successor or successors, any further assurance or conveyance or instrument in writing, as may be necessary at any future time to carry out the equitable intention of this deed. And it is hereby further provided and agreed these presents are upon the express condition that, upon the payment or satisfaction of the principal & interest of the aforesaid bonds, the estate hereby granted & conveyed to said W'm F. Norton, his successor or successors, and the property and effects mortgaged, conveyed, or transferred to him, shall cease & become void, and the said company shall thenceforth be fully & immediately reinvested with the same, both in law and equity, and in fact.

In virtue whereof the parties of the first part have caused these presents to be acknowledged by their president and attested to in their behalf by their president and secretary, and their common seal thereto affixed, the day & year first above written.

The New Orleans & Ohio Railroad Company,
By J. CAMPBELL, *President.*

Attest: J. WAYTT JONES, *Sec'ty.*

[NEW ORLEANS & OHIO RAILROAD COMPANY.]

35 STATE OF KENTUCKY, *McCracken County, sct:*

I, Philip H. Wallace, clerk of the county court for the county aforesaid, do certify that the foregoing deed of mortgage from the New Orleans & Ohio Railroad Company to W. F. Norton, was on the 26th

day of July, 1860, acknowledged before me in my office by J. Campbell, as president of said company, to be his act and deed for the purposes therein mentioned; and that I have admitted the same, together with this certificate, to record in my office.

Given under my hand this 27th July, 1860.

P. H. WALLACE, *C. M. C. C.*,
By R. H. HARRIS, *D. C.*

A copy. Attest:

J. SPENCE, *C. M. C. C.*,
By J. L. M. HUSBANDS, *D. C.*

Exhibit.

Know all men by these presents that the New Orleans & Ohio Railroad Company, duly incorporated by the act of the legislature of the State of Kentucky, by L. S. Trimble, its president, acting for & in behalf of said railroad company, do hereby acknowledge itself & its successors held & firmly bound unto the said United States of America in the full & just sum of sixty-five thousand and five $\frac{90}{100}$ dol-
36 lars, lawful money of the United States, being double the amount of the purchase, for which payment, well and truly to be made to the disbursing quartermaster of the United States military railroads, at its office in Nashville, or to such other disbursing quartermaster as may be designated by the War Department, within two years from the date of these presents, the said railroad company, by its president, hereby binds itself & its successors, firmly by these presents, sealed with its corporated seal, attested by the signature of its president, & affixed by the express authority of its directors, this fifth day of January, in the year of our Lord one thousand eight hundred & sixty-six, (1866.)

The nature of the above obligation is such that, whereas the above bounden railroad company has purchased & received, or shall receive, from the War Department of the United States, rolling-stock, iron rails, cross-ties, chains, spikes, timber, & other materials for repairing & operating its railroad, in quantities, at prices, & to an amount & value which shall be evidenced by the receipts given for the same by the said
37 railroad company to the proper officer of the said War Department, upon a credit of two years from the date of these presents payable in equal monthly installments, with interest at the rate of $7\frac{3}{10}$ per cent. per annum within the said two years, either in cash to the disbursing quartermaster of the United States military railroads, at his office in Nashville, & to such other disbursing quartermasters as may be designated for this purpose by the War Department, or in transportation of the troops or military supplies of the United States under the orders of the property military authorities, at the rates of fare & tools allowed for such services to northern railroads; & whereas the said railroad company desires, & by these presents intends, to secure to the United States the complete & punctual payment as aforesaid of the amounts which may be due for the said materials received or to be received by it from the United States:

Now, therefore, if the said railroad company shall well & truly pay as aforesaid, either in cash, in equal monthly installments, or in transportation as aforesaid, to the United States, within two years from the date of these presents, all that shall be due aforesaid to the United States
38 on account & in payment for all the materials received as aforesaid from the United States, then this obligation shall be void & of no effect. But if the said railroad company shall fail to pay to the

United States all or any portion of what may be due to the United States on account of the said material received from the United States within two years from the date of these presents, either in cash as aforesaid, or in transportation as aforesaid, & shall fail to pay any of the monthly installments aforesaid punctually when due, then this obligation shall remain in full force & effect to the extent that may be necessary to fully repay to the United States for the full amount which may be due on account of the said materials so received as aforesaid, & all loss or damage which may have been incurred by the United States by reason of the said railroad company's failure to pay for the same what shall be due thereof, when the same shall be due; and as a further security for such payment & indemnity to the United States, the United States shall have a lien upon the property sold to said company, & in default
39 of such complete & punctual payment of all moneys which may be due on account of the aforesaid purchase of materials, be fully authorized to take possession of & sell said property, & also to place in charge & control of the said company's railroad an agent of the United States, who shall be fully empowered, & by these presents is fully empowered, in case of such default as aforesaid, to collect all the revenues of the said company & pay the same to the payment of the United States of all the moneys which shall be due at the times of such application of such revenues to the United States for and any such materials which shall have been delivered by the United States to the said railroad company, or by reason of any loss or injury to the United States resulting from such default in payment of the same; & the said company shall have no authority to sell or convey out of its possession, without the consent of the United States first in writing obtained, any of the property referred to in this agreement, but shall hold & retain the same to the exclusive use of said company in carrying on the business of transportation of persons & property over its line of road, until the whole is fully paid for as aforesaid.

40 In witness whereof the corporate seal of said railroad company is affixed hereto by authority of its directors, and attested by its president.

New Orleans and Ohio R. R. Co.,
[SEAL.] By L. S. TRIMBLE, *President.*
Attest: J. H. GARDNER, *Sec'ty.*

Witness.

A copy. Attest:

J. SPENCE, *C. M. C. C.*,
By J. L. M. HUSBANDS, *D. C.*

And at a term of our circuit court, held for its March term, 1868, to wit, on the 19th day of March, 1868, the following proceedings were had:

UNITED STATES, & W'M P. MELLEN, TRUSTEE,
vs.
N. O. & O. R. R. COMPANY, &c.

This day came the plaintiff, by attorney, & filed an amended bill in this action. The plaintiff filed the following order, to wit, which was excepted to by the defendant:

The complainants, the United States, and W'm P. Mellen, trust-

41 ee, appeared by attorney, & filed a amended bill against the New Orleans & Ohio Railroad Company, W'm F. Norton, R. Enders, Henry Enders, L. M. Flournoy, Warren Thornberry, James Thornberry, and L. S. Trimble, and L. S. Trimble, trustee, and all other bondholders of the bonds of the N. O. & —— Railroad Company, secured by the mortgage named in the bill. And the United States writ of subpœna is ordered to issue against them; and it is ordered and directed by the court, that no process of subpœna is required to issue against any defendant not personally named, but in lieu thereof, it is ordered and directed that the defendant L. S. Trimble, trustee, do defend for an on behalf of all persons who are holders and owners of any & all first and second mortgage bonds and coupons of the New Orleans & Ohio Railroad Company not named personally in complainants' bill and amended bill.

The amended bill of complainants referred to in the above and foregoing order is as follows:

To the honorable judges of the circuit court of the United States for the district of Kentucky, at Paducah.

Your orators, the United States, and W'm P. Mellen, trustee,
42 the latter a citizen & resident of the State of N. York, will amend their original bill filed, and state that said bill was filed in your honorable court, but the same was not clearly stated in said bill, and your orators make the same more clear and definite; and further your orators will state to the said judges of the circuit court of the United States at Paducah for the district of Kentucky, that they are the holders & owners, by writing filed from Warren Thornberry, of the thirty-three mortgage bonds of the New Orleans & Ohio Railroad Co., named and fully described in said original bill filed; that the two mortgages filed were given, and duly executed, and delivered by the def't, the N. Orleans & Ohio Railroad Company, to secure the payment of the $200,000 00 of first & $200,000 of second mortgage bonds, of which the bonds of your orators are a part. Your orators say that they do not know who are the owners of the other mortgage bonds further than stated in their original bill, but they, said bonds, are held by a great number of persons, who are numerous and unknown to your orators, but they make said bondholders def'ts to this & their original
43 bill, & pray that S. Trimble, trustee, defend for and on their behalf. Your orators say they are numerous, because the $400,000 of bonds were negotiated by said railroad company to various persons, and the bonds being made payable to bearer, passed by delivery; and your orators state that said bonds have gone into the hands of many persons, and are now owned by numerous persons both residing in and out of the State of Kentucky. Your orators pray a foreclosure of said mortgages, and for a sale of all said mortgage property, and that said road be sold and proceeds applied to pay said mortgage debts; first, to pay the first-mortgage bonds, and the residue of proceeds to the payment of the second-mortgage bonds, and that the equity of redemption of said railroad company be barred. Your orators state further that the matters & things, and subject and purpose, of this suit are of common interest and right to all the holders of said first-mortgage bonds as a class; and, subject to the right of priority of payment of the holders of the first-mortgage bonds, the holders of the second-mortgage bonds have a common interest in the matters & things put in litigation and the relief prayed for in this suit, and all of said bondholders, first & second mortgage, have

44 a common right and interest in said mortgage property described in said mortgages filed, which are made part this bill, and your orators further state that def't L. S. Trimble is the trustee appointed by the N. Orleans & Ohio Railroad Company under the provisions in said two mortgages for and on behalf of all said mortgage bondholders in lieu of Linn Boyd, dec'd, in the first-mortgage, and W'm F. Norton, resigned, in the second-mortgage; and said def't is now the trustee, and your orators pray the court to require him to defend, and your orators make him defendant to this amended bill & original bill for and on behalf of all owners of mortgage bonds, first and second aforesaid, who are not personally before the court or named, and your orators pray for all general relief, and all relief prayed for in their original bill, and duty; & they make def'ts to this amendment & original bill, R. Enders, Henry Enders, W'm F. Norton, L. S. Trimble, Warren Thornberry, & James Thornberry, the N. O. & Ohio Railroad Company, & L. M. Flournoy, and pray for process of subpœna against them, they all being citizens & residents of the State of Kentucky.

UNITED STATES,
& W'M P. MELLEN, *Trustee.*

45 UNITED STATES *and District of Kentucky:*

Personally appeared before me L. D. Husbands, and made oath in due form of law that the statements in this amended bill, so far as made from his own knowledge, are true, and so far as made from the information of others he believes are true.

Given under my hand, as clerk of the circuit court of the United States for district of K'y, at Paducah, this March 18, 1868.

T. J. PICKETT, *Clk.*

And at a term of our said circuit court held for its November term, 1868, on the 12th day of November, 1868, the following proceedings were had:

W. P. MELLEN, TRUSTEE, &c.,
vs.
NEW ORLEANS & OHIO RAILROAD CO.

This day came the complainants, by their attorneys; came also the defendants by King, Husbands, Quigley, & Bigger, their attorneys.

Thereupon the defendants, by their attorneys, filed the separate answers of L. S. Trimble, W'm F. Norton, and L. M. Flournoy, president of said company, and the joint answer of R. Enders
46 & Henry Enders, also the joint answer of Warren & James Thornberry, and thereupon this cause is submitted.

The answers of defendants Trimble, Norton, Flournoy, president, & joint answers of R. & H. Enders, and Warren & James Thornberry, filed and referred to in foregoing order, are respectively in the words and figures following:

The answer of L. S. Trimble, appointed by the court to defend for and represent all the bondholders to the original and amended bills of W. R. Mellen, trustee, and the United States, filed in the circuit court of the United States for the district of Kentucky, at Paducah, against the N. Orleans & Ohio Railroad Company and others.

Respondent admits all the allegations in the original and amended bills of complainants, and joins them in their prayer for the sale of the

N. O. & Ohio railroad and property named in said first and second mortgages filed, and he prays that both said mortgages be foreclosed, and all said mortgage property sold to pay and satisfy, first, the bonds and coupons held by creditors secured by the first mortgage named in said
47 complainants' bills; &, secondly, to pay and satisfy the second-mortgage bonds & coupons secured by the said second mortgage named in complainants' bills & filed. And he prays that said mortgage property be all sold at once, sufficient to satisfy all said mortg'e debts secured by both mortgages; and that the court make all such orders and decrees in the case as shall be equitable and just; and that all bondholders be notified by publication to come forward and file their bonds and coupons unpaid in this case by some day to be designated by the court; and when filed that the court make such order and decree, applying the proceeds of the sale as shall be in accordance with the rules of equity and law; and that the court, in the mean time, render a decree at the present term of this court to sell at public sale all of said mortgage property. And he prays for all general and equitable relief.

L. S. TRIMBLE,
For and on behalf of all the Bondholders.

Personally appeared before the undersigned, a notary public for McCracken County, Kentucky, L. S. Trimble, and made oath in due form of law that the allegations in the foregoing answer are true.

Given under my hand this 11 Nov., 1868.

L. D. HUSBANDS,
Notary Public, M. C.

The answer of Wm. F. Norton to the original and amended bills of W. P. Mellen, trustee, & the United States, filed against him & others, and the N. O. & Ohio Railroad Company, in the circuit court of the United States for the district of Kentucky, at Paducah.

Respondent, for separate answer, states that he is the holder,
48 and represents & controls bonds of the N. O. & Ohio Railroad, secured by the first mortgage named in complainants' bill, to the am't of about $100,000, besides coupons attached, & coupons not attached thereto, as will be seen upon the same being filed, which respondent will do if required by the court. Respondent admits all the allegations in complainants' bill, and amended bill, in regard to said first mortgage; that he also holds, and represents, & controls bonds of said N. O. & O. R. R. Company, secured by said second mortgage named in complainants' original and amended bills—in amount about $85,000—besides detached coupons, & coupons attached, & will file same when required by the court.

Respondent joins in the prayer of complainants for the foreclosure of said mortgages, & for a sale of all said mortgage property & road; and he admits all the allegations made in complainants' bills, and prays that a judgment may be rendered at the present term of the court for a sale of all said road and mortgaged property, and he prays for all general and equitable relief.

W. F. NORTON.

49 STATE OF KENTUCKY, *McCracken, County, sct:*

This day personally appeared before the undersigned, L. D. Husbands, a notary public for the county and State aforesaid, W. F. Norton, & made affirmation, in due form of law, that the statements in this answer are true, this Nov. 12, 1868.

L. D. HUSBANDS, *N. P. M. C.*

The answer of the New Orleans and Ohio railroad, by L. M. Flournoy, president of the company, to the original and amended bills of W. P. Mellen, trustee, and the United States, filed in the circuit court of the United States for the district of Kentucky, at Paducah:

Respondent, for answer to the same, saith that he and the New Orleans and Ohio Railroad Company admit all the allegations in complainants' original and amended bills. And, further answering, respondents say that the said New Orleans and Ohio Railroad Company issued bonds to the amount of two hundred thousand dollars, and negotiated the same, which bonds are secured by the first mortgage named in complainants' bill, which are in the hands of individuals; and no part of the principal of said bonds have been paid, but some of the coupons have been
50 paid; how much respondent does not know, and has not the means of ascertaining; but those of the coupons that have been paid were destroyed or cancelled; that said company issued and negotiated two hundred thousand dollars of bonds, which were secured by the second mortgage named in complainants' bill, with coupons attached, which were all negotiated, and are now held by individuals. Some of these coupons have also been paid; how many these respondents do not know, and have not the means of ascertaining; but they say that such as were paid have been destroyed or cancelled, so that respondents say that whatever coupons are now outstanding that may be presented and filed in this case are unpaid.

The respondents say that during the late civil war many of the records and papers of the company were either lost or destroyed, so that respondents cannot answer more definitely as to the numbers and amount of coupons that have been paid. Respondent, further answering, says that he cannot state who holds all the bonds against said railroad company; and respondent will further answer and state that the said railroad company are not making any money over and above running
51 expenses with which to pay any part of said bonds or coupons.

Respondent will further answer and state that since the giving of said mortgages the collector of internal revenue taxes of the United States, for internal revenue taxes, to W. F. Norton, certain passenger and freight cars, as per schedule herewith filed, in payment of the taxes the said railroad company owed the United States government; that the said property is now being by the railroad company under daily lease from W. F. Norton, the owner, and which is not liable for, nor ought it be subjected to, the payment of said mortgage bonds and coupons. Respondent, further answering, says that in ordering a foreclosure of said first mortgage, it would be better for all parties interested to have the whole road sold; and he therefore asks that when a sale shall be made that the whole road and mortgaged property (except such as was purchased by W. F. Norton, heretofore described) be sold to satisfy both mortgages, and both series of bonds and coupons, giving to the first-mortgage bonds priority of payment, as respondent states that to sell the road to pay none but the first-mortgaged bonds would be prejudicial to the interests of the company and mortgagees;
52 so that respondent asks that [that] the court adjudge a sale of the entire road-bed and all the mortgaged property (except that purchased and owned by W. F. Norton) when a sale shall be ordered to satisfy both series of mortgaged bonds and coupons, giving to the first-mortgage bonds and coupons their proper priority. Having now fully answered, prays for all general relief.

BIGGER & MOSS,
Att'ys for Respondents.

STATE OF KENTUCKY, *McCracken County, set:*

Personally appeared before me, L. D. Husbands, a notary public for the county & State aforesaid, L. M. Flournoy, and made oath, in due form of law, that the statements in the foregoing answer are true, this Nov. 11, 1868.

L. D. HUSBANDS, *N. Public.*

The answer of R. Enders and Henry Enders to the original and amended bills of W. P. Mellen, trustee, & the United States, against the N. O. & Ohio Railroad Company & others, filed in the circuit court of the United States for the district of Kentucky, at Paducah.

53 Respondents, for answer, say that the did own some of the bonds of the N. O. & Ohio Railroad Company, secured by said mortgages, but they have sold the same, and now hold none of said bonds; and therefore, having no personal interest in this suit, or in the relief prayed for, they ask to be dismissed, & for all general relief.

R. & H. ENDERS,
By L. D. HUSBANDS, *Att'y.*

PADUCAH, *Nov.* 12, 1868.

Sworn to before me, by H. Enders.
[SEAL.]

HENRY W. RANKIN,
Notary Public.

The answer of Warren Thornberry and James Thornberry, to the original and amended bills of W. P. Mellen, trustee, & United States, filed in the circuit court of the United States for the district of Kentucky, at Paducah, against the N. O. & O. R. R. Company, and these respondents & others.

Respondents answer and say that they admit all the allegations in complainants' original and amended bills; and further say that they are willing for the court to render a decree in this case at the present term of this court, granting all the relief prayed for in complainants
54 bills and foreclosing the mortgages of respondents to said W. P. Mellen, trustee, upon said mortgage bonds held by said W. P. Mellen, trustee; and respondents pray that the court decree a sale of railroad & all said mortgage property at this term of the court, and they pray for all general and equitable relief.

WARREN THORNBERRY and
JAMES THORNBERRY,
By L. D. HUSBANDS, *Att'y.*

STATE OF KENTUCKY, *County of McCracken:*

I, L. D. Husbands, a notary public for the county aforesaid, do certify that James Thornberry made oath before me, in due form of law, that the statements in the foregoing answer are true.

This 11th Nov., 1868.

L. D. HUSBANDS, *N. Public.*

55 And at another day of said term, the 13th day of November, 1868, the following decree was rendered, to wit:

W. P. MELLEN, TRUSTEE, AND THE UNITED States and others, complainants,
against
THE NEW ORLEANS & OHIO RAILROAD COMpany & others, defendants.
} Decree.

This day this cause came on to be heard by consent of all parties upon the original & amended bills of complainants, and the answer of the New Orleans & Ohio Railroad Company, and L. M. Flournoy, president of said company, the answer of W. F. Norton, of R. & H. Enders, of Warren and James Thornberry, and of L. S. Trimble, trustee, and as defending for and representing the holders of bonds and coupons unpaid and secured by said first and second mortgages named in complainants' bills, and all exhibits refered to in the pleadings and orders of court, and the court being sufficiently advised, and it appearing to the court that the defendant, the New Orleans & Ohio railroad, is indebted to the holders of the first-mortgage bonds the sum of two hundred thousand dollars, principal, with interest thereon at the rate of seven per cent. per annum from the first day of July, 1867; & also
56 is further indebted to said bondholders for the previous semi-annual interest theretofor accrued & evidenced by the coupons attached to said bonds in amount yet unpaid, as shall hereafter be made appear by the exhibition of said coupons yet outstanding & in the hands of individuals; and it appearing to the court that said defendant, the New Orleans & Ohio Railroad Company, is further indebted to the holders of what is known & styled in complainants' bills as the second-mortgage bonds, issued and negotiated by said railroad company, the sum of two hundred thousand dollars, principal not due, however, according to the & effect of said bonds, until the first day of April, 1875; and that said railroad company is also indebted for and on account of the coupons attached to said bonds, part due & to become due on amount as many may be made to hereafter appear by the exception of such coupons as have not been paid; & now it also appearing that in order to secure the payment of all said first-mortgage bonds, with the coupons attached thereto when negotiated, said defendant, the New Orleans & Ohio Railroad Company, did, on the 22d day of March, 1858, execute and deliver to Linn Boyd, trustee
57 for and on behalf of all persons who might become the holders of said bonds and coupons, a deed in trust or mortgage upon all of the said New Orleans & Ohio railroad lying between its respective termini, constructed & to be constructed, together with all & singular its franchises, the railways, bridges, fences, warehouses, fixtures, privileges, rights, road-bed, right of way, real estate, engines, cars, machinery, & all other property owned by said company; and it also appearing to the court that said New Orleans & Ohio Railroad Company, in order to secure the payment of said second-mortgage bonds, & coupons attached to them when negotiated, did, on the first day of April, 1860, execute a deed in trust to W. F. Norton and to his successors, upon & to all and singular the rights and privileges of every kind and name as hereinafter set forth, and warranting the described items, assets, and real estate free from all claims, liens, or encumbrances, done or to be done by said company, except the mortgage aforesaid, of date the 22d March, 1858, said items conveyed and named in said second mortgage being the said New Orleans & Ohio railroad, lying between its respective termini, constructed & to be constructed, together with all and singular its franchises, railways, rails, bridges, fences, warehouses, fix-

tures, privileges, rights, road-bed, right of way, real estate,
58 engines, cars, machinery, & all other property owned by said company; & it now appearing that said Norton resigned his trusteeship, and Linn Boyd departed this life, and L. S. Trimble was duly appointed trustee in their room & stead by the president and directors of said railroad company, and that in foreclosing said first mortgage it would be to the best interest of all parties that the second mortgage be also at the same time foreclosed:

It is, therefore, by consent of parties, ordered and adjudged that said two mortgages be foreclosed, and the equity of redemption of said New Orleans & Ohio Railroad Company be barred; and it is further ordered and decreed that all of said mortgag property, to wit, the New Orleans & Ohio railroad, together with all the rights, privileges, franchises, right of way, and property mortgaged as hereinbefore enumerated and described, except such part thereof as has since been sold by the United States internal revenue collector for taxes & purchased by def't W. F. Norton, be sold by the marshall, W. A. Meriweather, to the highest & best bidder at public outcry at the court-house door, in the city of Paducah, on the first day of some public court to be held for McCraken County, after first advertising said sale for a period of ten days, at least twenty days
59 before the day of sale, in some daily paper published in the city of St. Louis, in Louisville, in New York, Memphis, Cincinnati, and Nashville, 30 days in a weekly paper published in Paducah; that he mak said sale for one-fourth cash in hand and the balance to be paid in two equal payments, due at six and twelve months, & bearing interest from date, & for which said marshall will take sale bonds from purchaser, with good and approved surety, payable to himself as marshall, and a lien is retained on said property for the satisfaction of the defered payments. But, by consent of all parties, said sale is not be made by said marshall until after the expiration of eighty-five (85) days from the filing of this judgment, and W. A. Meriweather, marshall, is directed to carry into effect the decree; that he make the sale; that he report to court; & collect the purchase price of said property when sold, & report the same to this court. And it is further adjudged that after paying all costs of this suit & the expenses of sale, that the proceeds arising from said sale be first applied to the payment in full, if sufficient, of all of said first-mortgage bonds and coupons attached or belonging to the same, and if these shall not be sufficient to pay all of the same, these payments therein to be made pro ratta. And its
60 is further adjudged that if there shall be of the net proceeds of sale of said mortgage property more than a sufficiency to pay all of said first-mortgage bonds and coupons, then such residue is adjudged to be applied to the payment of said second-mortgage bonds & such of the coupons thereto attached that shall be due and unpaid and the time of said sale; and if such residue shall be insufficient to pay all said second-mortgage bonds and coupons due at the day of sale, then the same is adjudged to be paid thereon pro ratta.

And it now further appearing to the court that, on the first day of Oct., 1867, the defendant Warren Thornberry assigned, transfered, and delivered to complainant W'm P. Mellen, trustee, for the use & benefit of the United States, to secure the payment in part of the indebtedness of said Thornberry to the United States the following bonds & coupons secured by said first & second mortgages, to wit, eight first-mortgage bonds, numbered 9, 12, 14, 18, 141, 142, 143, and 144, each for one thousand dollars, with no coupons attached; also twelve other first-

mortgage bonds for one thousand dollars each & numbered 2, 122, 123, 124, 125, 126, 129, 130, 131, 132, 133, & 134, with seven coupons attached to each, of $35 00 each; also seven second-mortgage bonds on
61 said railroad company, numbered 61, 62, 63, 64, 65, 66, and 122, of one thousand dollars each, together with one hundred & twelve coupons attached, of $35 00 each; also six other second-mortgage bonds of one thousand dollars each, and numbered 27, 28, 74, 92, 135, & 136, with one hundred & thirty-five coupons, attached of $35 00 each: It is now therefore adjudged and decreed that the United States be substituted to all the right of said Warren Thornberry as against the New Orleans & Ohio Railroad Company, and said Thornberry's equity of redemption in said mortgage bonds is hereby barred, & it is adjudged that the United States be and are the owners of said bonds by virtue of the said assignment of Thornberry. And it is further adjudged that the United States are entitled and shall have all of the proceeds that shall be realized as the proper pro ratta portion payable upon said bonds out of the proceeds of the sale of all said road & mortgage property as shall be found to be properly distributable & payable thereon by this court hereafter, & said sum, when so realized & paid to the United States, shall be a credit upon the indebtedness of Thornberry to the United States, named & set forth in complainants' bill. And it is now further ordered & decreed that W. H. Jones be, & he is hereby, appointed this court's special commissioner, whose duty it shall be, & he is hereby directed, to give notice to all bondholders to come forward, present & file with said commissioner all bonds and coupons, both of the first and second
62 mortgage bonds, on or before the second Monday in March, 1869; that he give due & proper notice for thirty days by publication in some newspaper published in the city of N. York, are in St. Louis, or in Memphis, in Louisville, Cincinnati, & also in the city of Paducah; and it shall be the further duty of said commissioner, & he is directed, to audit & make out & a full & complete report of all bonds & coupons yet unpaid secured by the first mortgage; also all bonds & coupons due and unpaid & to become due, secured by the second mortgage, and the names of the holders thereof respectively; that he report to the court on the first day of the next term. & all questions not hereinbefore adjusted are reserved for future adjudication.

63 And at another day of said term, the 25th day of March, 1869, the following proceedings were had:

W'M P. MELLEN, TRUSTEE, & THE UNITED States, &c.,
vs.
THE N. O. & O. R. R. COMPANY, &c.

This day came W. A. Meriwether, United States marshal, and on his motion it is ordered that his report of the sale of the New Orleans and Ohio railroad be, and the same is hereby, received and filed.

And on the same day of said term last aforesaid the following proceedings were had:

W. P. MELLEN, TRUSTEE, & UNITED STATES, & others,
vs.
THE NEW ORLEANS & OHIO RAILROAD CO., &c.

64 This day came the parties and filed a written agreement herein; and by consent of both parties, this cause is submitted to the court.

W. P. MELLEN, TRUSTEE, &c.,
vs.
N. O. & OHIO RAILROAD CO., &c.

The following facts are agreed between complainants, W. P. Mellen trustee, &c., L. S. Trimble, appointed by the court to represent the 1st & 2nd mortgage bondholders, against the N. O. & O. Railroad Co., W. F. Norton, & others, on the one part, and the United States on the other part, and the question is submitted to the court whether said 1st & 2nd mortgage bondholders, by virtue of their said mortgages, one of date 27th day of March, 1858, the other dated 20 day of January, 1860, have a superior equity & right to the rolling stock not sold under the
65 judgment in this case, to wit, two locomotives, Nos. 15 and 152, and nine box-cars, & one stock-car—said property, it is admitted, would be necessary to pay said first & second mortgage bonds; or whether the United States has a superior equity in and right to said property, by virtue of a written agreement or mortgage, dated 5th January, 1866, filed herewith, & which was executed by L. S. Trimble, president of N. O. & Ohio Railroad Company, having full authority to execute the same to the United States. And it is admitted that said agreement has never been legally acknowledged for, or recorded in the proper county clerk's office, and that none of said first and second mortgage bondholders, or the N. O. & Ohio Railroad Company, had notice of said agreement between N. O. & Ohio Railroad Company & the United States except L. S. Trimble.

And upon the foregoing questions and facts by agreement of parties, the judicial determination thereof is submitted to the court, to be
66 tried at chambers, and the judgment to be filed in vacation by the court.

L. D. HUSBANDS,
Att'y for W. F. Norton, & others,
& L. S. TRIMBLE,
Holders of 1st & second mortgage bondholders.
JAMES SPEED,
Att'y for U. States.

(The mortgage herein referred to is on pages 35, 36, 37, 38, 39, 40.)

And on another day of said term, the 26 day of March, 1869, the following proceedings were had:

W. P. MELLEN, TRUSTEE, & THE UNITED States, &c.,
vs.
THE NEW ORLEANS AND OHIO RAILROAD COMpany & others.

The report of W. A. Meriwether, United States marshal, of the sale of the New Orleans and Ohio railroad, filed March 25, 1869, is in the words and figures following, to wit:

67 *Copy of marshal's report.*

W. P. MELLEN, TRUSTEE, & THE UNITED States, &c.,
vs.
THE NEW ORLEANS AND OHIO RAILROAD Company & others.

In obedience to the decree of the circuit court of the United States for the Kentucky district, at Paducah, dated at Paducah, on the 13th day of November, 1868, in the above-mentioned cause, commanding me, as United States marshal for said district, to sell the New Orleans and Ohio railroad, together with all the rights, privileges, franchises, right of way, and property mortgaged as thereinbefore enumerated and described, except such part as has been sold by the United States internal revenue collector for taxes, to the highest and best bidder, at public auction, in the city of Paducah, on the first day of some public court, to be held for McCracken County, after first advertising said sale for a period of ten days, at least twenty days before the day of sale, in some paper in the city of St. Louis, in Louisville, Memphis, New York,
Nashville, Cincinnati, and Paducah—said sale to be for one-fourth
68 cash in hand, and the balance in two equal payments, due at six, and twelve months from date, for which said marshal will take sale bonds from purchasers, with good and approved security, payable to himself, as marshal, and a lien to be retained on said property for the satisfaction of the deferred payments, I did advertise said railroad, &c., to be sold at the court-house door, in the city of Paducah, on the 8th day of February, 1869, it being the first day of the McCracken County court, as directed by said decree, except that there being no daily newspaper in the city of Paducah, did advertise in the Weekly Gazette, and Paducah Herald, at Paducah, the first insertion being more than thirty days from the day of sale, (see advertisements hereto attached;) and, on the day and hour and place mentioned in said advertisement, did offer all of the above-mentioned railroad, &c., except so much as was in decree excepted from sale, and two locomotives, engines Nos. 15 and 152, nine box-cars, and one stock-car, which I was instructed not to sell by L. D. Husbands, att'y for the
United States and others, and J. M. Bigger, att'y for the New Or-
69 leans and Ohio R. R., for sale at public auction, to the highest and best bidder. At the commencement of the sale, the question was asked of me, as marshal, what were the termini of the road which I was selling. My answer was, that part of the road mentioned as mortgaged in the decree, which the attorneys for the parties to the proceedings had informed me, was from the terminus at Paducah, to the Kentucky State line, and did so proclaim; the bidding having commenced, and advanced to the sum of three hundred thousand dollars, W. P. Mellen presented to me a written demand to postpone the sale, being satisfied, as he said, there was a combination to purchase for much less than its value, and that if the sale was postponed, and a sale advertised for another time, was satisfied he could procure parties who would bid a larger sum than the bid which was then made.

This I declined to do, and proceeded with the sale, said Mellen being a bidder, and Ex. Norton having bid the sum of three hundred and fifty thousand & one dollars, and no one bidding more, it was stricken off to him as the purchaser; and thereupon said Ex. Norton did deliver to me his two bonds, payable at six and twelve months from date,

70 with L. S. Trimble, Sam. B. Thomas, and W. F. Norton, as securities, each bond for the sum of one hundred and thirty-one thousand two hundred and fifty dollars and thirty-seven cents, ($131,250 37,) with interest from date, (see bonds herewith returned;) and said Ex. Norton, and associates in the purchase, holding about three-fourths of the mortgaged bonds and coupon mentioned in said decree, they paid to me twenty-one thousand eight hundred and seventy-five dollars and six cents, ($21,875 06,) it being one-fourth of the cash payment of this sale, required in this decree, I holding as collateral all the said bonds and coupons, which they then had, to secure any further cash payment which may be necessary to pay costs, &c., after report of the commissioner appointed in this case; and thereupon I gave to said Ex. Norton an order on the directors of said railroad company, to deliver the said railroad, and other property sold, and ordered to be sold by the said decree, except that mentioned above as not sold, he being the purchaser. No deed has been made to the property sold.

For fees and expenses, the marshal asks the following:

71

For advertising, as per bills herewith returned.....	$183 95
Commissions on am't of sale.....	3,500 00
	$3,683 95

W. A. MERIWETHER,
U. S. M. K. D.

Agreement.—Filed on same day, 26th day of March, 1869.

Paducah, Ky., Feb'y 5, 1869.

THE UNITED STATES, W. P. MELLEN, &c., Trustee, *against* THE N. O. & OHIO R'ROAD COMPANY, &c. } No. 2d.

The marshal appointed in the above case in the judg't rendered in the circuit court of U. States, at Paducah, to sell the N. O. & O. r'road & mortgage property named in said decree, will not sell that portion of the rolling-stock of said road which was purchased by the r'road company from the gov't of the U. States, the reserved list of which has been heretofore sent Hon. Jas. Speed, att'y for War Department.

L. D. HUSBANDS,
Att'y for U. States & others,
And J. M. BIGGER,
Att'y for the N. O. & Ohio R. R. Company.

72 And further:

It is ordered and directed in this cause that W. H. Jones, the commissioner appointed at the last term of this court for the purpose of facilitating a final distribution of the proceeds of the sale of the property sold under the decree in this case, do make and report to the court on the first day of the next term a full and complete calculation and statement of the amount (first) of all that will be due upon the first-mortgage bonds and coupons, calculating interest thereon up to the first day of July, 1869, and the amount due to each holder, respectively, of said bonds; and that he make a like calculation and statement of the

second-mortgage bonds and coupons, with the am't due each holder thereof, respectively; that he also report & file all bonds, not heretofore filed, that may be presented.

And it is further ordered that the marshal, M. A. Meriwether, do pay out of the funds in his hands, arising from the proceeds of the sale made by him in this cause, all internal revenue tax yet due and
73 unpaid to the gov't of U. States; that he also pay all State revenue tax, the tax due the county of McCracken, and the tax due the city of Paducah, taking proper receipts therefor, that be yet unpaid & owing by said New Orleans & Ohio Railroad Company; that he report same to next term of this court.

And it is further ordered that W. H. Jones, com'r, be allowed $271 95, expenses incurred by him; and also that he be allowed for his services, as commissioner in this case, eight hundred dollars, and that the marshal pay him said amounts out of the proceeds of said sale.

And it is further ordered that the said marshal convey by deed to the purchaser Ex. Norton said railroad and franchises, property and appurtenances, purchased by him under said sale; that he report deed to the court.

And further:

The marshal, W. A. Meriwether, having filed at the present term his report of the N. O. & Ohio r'road, franchises of the company, and other property of said company sold by him as marshal, and purchased by Ex. Norton, under the decree of this court rendered at the last
74 term, and no exceptions having been filed to said sale or report, it is, therefore, ordered and adjudged by the court that said sale and report be, and the same are, now confirmed, and said report is ordered to be recorded.

And it is further ordered that said W. A. Meriwether be allowed $183 95, as expenses incurred, and also the sum of $3,500 00, as commission or compensation for his services in making said sale and carrying into effect the judgment of the court, as charged by him in his report, to be retained by him out of the proceeds of said sale.

And upon the 30th day of June, 1859, the following proceedings ordered of record in this court:

W. P. MELLEN, TRUSTEE, &c.,
vs.
NEW ORLEANS & OHIO RAILROAD COMPANY, &c. } Equity.

Upon the facts agreed betwixt complainants and defendants, and submitted on the 25th day of March, 1869, it is ordered and adjudged that the United States has the superior equity & right to the
75 property described in said agreed case, to wit, two locomotives, Nos. 15 and 152, nine box-cars, & one stock-car; and the def't, the New Orleans & Ohio Railroad Company, is hereby ordered to deliver to J. B. Van Dyne, an agent of the War Department, the said property for sale, and when sold, to credit said bond of date 5th January, 1866, with proceeds of sale. Such is the decree agreed betwixt the parties in the event the court considered the government having the superior equity to said property.

BLAND BALLARD.

And on the 21st day of July, 1869, the following proceedings were had in our said court:

MELLEN, TRUSTEE, &c.,
vs.
N. ORLEANS & OHIO RAILROAD COMPANY, &c. } Decree.

This day came L. S. Trimble & W. F. Norton, representing the holders of the mortgage bonds of the N. O. & O. R. R., and prayed an appeal to the Supreme Court of the United States from the decree rendered on the 30th day of June, 1869, upon the agreed facts, which is granted
76 upon the said L. S. Trimble & W. F. Norton executing a bond, with surety in the sum of $20,200, that being double the value of the property decreed to the U. States, with condition thereunder written that if the Supreme Court shall affirm the decree aforesaid, then the bondsmen are to pay to the U. States one-half the amount of said bond, with interest thereon, & all such further damages & costs as the court may award; the bond to be executed before, and the security to be approved by, C. S. Marshall, a commissioner of this court, within five days.

And further:

On July 23rd, 1869, came L. S. Trimble and W. F. Norton, and filed in the clerk's office an appeal bond, which is in words and figures following:

Circuit court of the United States, 6th circuit, district of Kentucky.

W. P. MELLEN, TRUSTEE, &c.,
vs.
THE NEW ORLEANS & OHIO RAILROAD COMPANY & OTHERS. } Appeal bond.

We, L. S. Trimble and W. F. Norton, principal, and A. A. Trimble, surety, are held and firmly bound unto the United States of America in the sum of twenty thousand two hundred dollars, ($20,200,) for
77 the payment of which, well and truly to be made, we bind ourselves, our heirs, &c., jointly & severally, by these presents, dated this 23rd day of July, A. D. 1869.

The condition of the above bond is such that, whereas the above-bound L. S. Trimble and W. F. Norton, representing the holders of the mortgage bonds of the New Orleans and Ohio Railroad Company, have been granted an appeal to the Supreme Court of the United States for the 6th circuit & district of Kentucky, on the 30th day of June, A. D. 1869, in the said action of W. P. Mellon, trustee, against the New Orleans & Ohio Railroad Company & others: Now, should the said decree be reversed by the said Supreme Court on said appeal, or should the said decree be affirmed by said Supreme Court, and the said L. S. Trimble & W. F. Norton, and the said A. A. Trimble, or either of them, shall pay to the United States one-half of the amount of said bond, with interest thereon at the rate of six per cent. per annum, and all such further damages & costs as the court may award, then the above
78 bond to be void; otherwise to remain in full force & virtue.

Witness our hands this the date above written.

L. S. TRIMBLE.
W. F. NORTON.
A. A. TRIMBLE.

Acknowledged before me, and securities approved by me, this 23rd day of July, A. D. 1869.

CHAS. S. MARSHALL,
Com'r for U. S. Circ't C't for 6th Circuit & District of Kentucky.

79 And on another day of said term, the 3rd day of November, 1869, the following proceedings were had:

W. P. MELLEN, TRUSTEE, &c.,
vs.
N. O. & O. R. ROAD, &c.

This day came the parties aforesaid, by their attorneys; and W. A. Meriweather, former marshall of this court and State, produced a deed of conveyance to E. Norton, the purchaser, which was acknowledged by said marshall in open court as his act and deed; said deed is ordered to be recorded in this court, and to be stamped by said marshall, & paid for out of the proceeds of the sale, and the marshall to be credited therewith.

It is further ordered that the former reports of said marshall in this case be confirmed, no exceptions appearing thereto.

And this day came R. E. Allen, by his attorney, John Q. A. King, & filed his exceptions to the report of W. H. Jones, special commissioner.

The deed above refered to is in the words & figures following, to wit:

This indenture, made and entered into this 26th day of March, 1869, between W. A. Meriweather, as United States marshall for the Kentucky district, of the first part, and Ex. Norton, of the second
80 part, witnesseth:

That whereas, in the suit of W. P. Mellen, trustee, and the United States and others against the New Orleans & Ohio Railroad Company & others, in the circuit court of the United States for the Kentucky, at Paducah, it was ordered and decreed in said suit, at the November term, 1868, of said court, among other things: "The New Orleans & Ohio railroad, together with all the rights, privileges, franchises, right of way, road-bed, rails, bridges, fences, warehouses, fixtures, real estate, engines, cars, machinery, & all other property owned by said company, should be sold by said party of the first part, as marshall, at the court-house in Paducah, at public sale, to the highest bidder, on the first day of some public court to be held for McCracken County, to satisfy the judgment named & rendered in said decree, save and except such part thereof as had previously thereto been sold by the internal revenue collector for taxes, and purchased by W. F. Norton for one-fourth cash in hand, and the balance in two equal payments, bearing interest from date & payable in six & twelve months from day of sale, & to secure the defered payments a lien to be
81 retained upon the property;" and whereas, since the rendering of said decree & before the sale, by further consent of the parties, by their attorneys, L. D. Husbands & J. M. Bigger, it was directed in writing that the said marshall, in selling, should except from said sale two (2) locomotives, Nos. 15 and 152, and nine (9) box-cars, & one (1) stock-car; and whereas said party of the first part, after first advertising the sale, as shown by his report of sale to the court, which report was approved & confirmed by said court, did, on the 8th day of February, 1869, sell at the court-house door, (it being the first day of the McCracken County court,) all of said property decreed to be sold, to wit: "The New Orleans & Ohio railroad, situate & lying betwen the Tennessee State line and the terminus at or in Paducah, Kentucky, including the road-bed, & the right of way, iron rails, warehouses, real estate,

franchises, rights, and privileges, and all the property of said company save [save] and except said locomotives Nos. 15 and 152, nine (9) box-cars, and one stock-car," and Ex. Norton, party of the second part, became the purchaser of the same at the price of three hundred & fifty thousand and one (350,001 00) dollars, he being the best & high-
82 est bidder at that price, and said party of the second part having made such cash payment as is mentioned in said report of sale, & having executed his two bonds dated February 8th, 1869, with L. S. Trimble, Samuel B. Thomas, and W. F. Norton as securities, for the sum of one hundred & thirty-one thousand two hundred & fifty $\frac{37}{100}$ (131,250 37) dollars each, one payable six months after date, & the other payable twelve months after date, for the residue of the purchase price, all of which having been reported to the court, & said sale & report having been confirmed, & the court having ordered and directed the party of the first part to convey by deed to the party of the second part:

Now, therefore, for and in consideration of said order and the purchase price aforesaid paid and to be paid, & to secure the payment of the bonds above mentioned, a lien is hereby retained on all of the above-mentioned property. The said party of the first part, as marshall aforesaid, hath this day, & doth by these presents, sell, convey, and confirm unto the said party of the second part all & singular said road,
83 road-bed, iron, right of way, franchises, privileges, and appurtenances lying in the State of Kentucky, together with all the real estate and property decreed to be sold, & which was purchased by the party of the second part, real, personal, and mixed, of whatever kind appurtenant to said railroad lying in Kentucky, or owned by said New Orleans & Ohio Railroad Company, save & except said locomotives Nos. 15 and 152, and nine (9) box-cars & one (1) stock-car, aforesaid, to have & to hold the same forever; & the party of the first part, as marshall, in as full and complete a manner as by law he as such can or ought to do, hereby warrants the title of all said property conveyed against all persons whatsoever, but he is in no wise responsible in the warranty.

Witness my hand & seal the date aforesaid.

W. A. MERIWEATHER,
U. S. Marshall K'y District.

[Stamp, $175 00; 176 00—$351 00.]

Ordered that said deed be delivered by the clerk of this court to Ex. Norton, the grantee.

84 UNITED STATES OF AMERICA,
District of Kentucky, set:

I, J. R. Puryear, clerk of the circuit court within and for the district of Kentucky, do certify that the foregoing 83 pages contain true and complete copies of the proceedings had in said court, and pleadings in the cause of the United States & W. P. Mellen, trustee, & others, vs. the New Orleans and Ohio Railroad, as same appear from the records in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 3rd day of March, in the year A. D. 1869, and in the 94th year of our independence.

[SEAL.] JOHN R. PURYEAR,
C. C. C., K. D.

Clerk's fees.

Filing & entry, judgments, &c	$6 20
This copy, 188 folios, @ 10c	$18 80
	$25 00

Attest: J. R. PURYEAR, *Clerk.*

(Indorsement on cover:) No. 432. The New Orleans and Ohio Railroad Company, L. S. Trimble et al., appellants, vs. W. P. Mellen, trustee, and the United States. Kentucky C. C. U. S.
Filed 14th March, 1870.

In the Supreme Court of the United States.

THE NEW ORLEANS AND OHIO RAIL-ROAD COMPANY ET AL., Appellants, *vs.* W. P. MELLEN, Trustee, and the UNITED STATES.	No. 202. Dec'r Term, 1870.

Brief for Appellants.

This is an appeal from a decree of the Circuit Court of the United States for the District of Kentucky.

CIRCUMSTANCES OF THE CASE.

In a settlement of accounts between the United States and a debtor named Thornberry, the latter transferred to Wm. P. Mellen, a number of coupon bonds of the N. O. and O. R. R. Co., in trust to secure the debt due to the United States.

These bonds were part of two issues of bonds of $200,000 each, secured by mortgage given in 1858 and 1860, respectively, upon all the property of the railroad company, real and personal, including personal property to be thereafter acquired. Rec., pp. 6, 8 and pp. 9, 11.

Some of the bonds and coupons being overdue and unpaid, Mellen and the United States filed a bill in the Circuit Court of the United States for Kentucky District, to foreclose the mortgages.

To this bill Thornberry, and all the bondholders, and L. S. Trimble, trustee of the mortgagees, were made parties defendant; and certain only of the bondholders being

named, by order of the court, Trimble was ordered to defend on the part of all bondholders not named and against whom, therefore, no process could issue (Rec., 14); and such proceedings were had by consent of parties, that the mortgage of the bonds by Thornberry to Mellen in favor of the United States was foreclosed, and the said bonds became the property of the United States (Rec., p. 21, line 12), and the two mortgages given by the railroad company were also foreclosed and a sale by the marshal was decreed. Rec., p. 20.

The proceedings upon which this decree was made were confined to the single aspect in which the bill of Mellen and the United States placed the claim of the United States, that is to say, as holding the right of Thornberry to the certain bonds which he had conveyed to Mellen by way of mortgage to secure the United States, and consequently as setting up no adverse or inconsistent right to those of the other bondholders under the two mortgages or deeds of trust made by the company, but claiming to share only, *pari passu*, as bondholders in the proceeds of the property mortgaged by the company.

The order of the court appointing Trimble to defend in behalf of the unnamed bondholders was also limited to this case which alone was shown by the record.

Upon the case so made a decree was made on the 13th of November, 1868, reciting the two mortgages of 1858 and 1860, foreclosing them and ordering a sale, and providing for a distribution of the proceeds among all the bondholders, *pro rata*, preserving their priority as between the two mortgages. And proceeding also to foreclose the mortgage of Thornberry to Mellen for the United States, without any sale, but in lieu thereof, passing the property in said bonds directly to the United States, and foreclosing all equity of redemption therein. See Rec., p. 19.

WHERE THE QUESTION IN THE CASE ARISES.

Afterwards, to wit, February 8, 1869, the marshal being in the actual execution of the decree of sale, he was instructed by L. D. Husbands, attorney for the United States and others, and by J. M. Bigger, attorney for the N. O. & O. R. R. Co., not to sell two locomotive engines, No. 15 and 152, nine box cars and one stock car, and the same were accordingly reserved from sale. Although the same were included in the mortgages and decree. See Marshal's report, Record, p. 23, and request p. 24,

Thereafter without any amendment to the bill or other proceedings, setting up or suggesting any right in the United States adversary to those of the other bondholders, an agreement was made (see Rec., p. 22) between W. P. Mellen, trustee, &c., L. S. Trimble, appointed by the court to represent the 1st and 2d mortgage bondholders against the N. O. & O. R. R. Co., W. F. Norton and others of the one part, and the United States on the other part, purporting to make as to the property so reserved from sale, an entirely new case, not theretofore litigated between the parties or in any manner suggested upon the record, whereby the parties to said agreement stipulated that it should be submitted to the court whether the United States had a superior equity in and right to the said reserved property by virtue of a certain written agreement between the Railroad company and the United States, there first set forth, and upon certain facts agreed by the same parties in the same agreement. And thereafter on the 30th of June, 1869, the court decreed that the United States had the superior equity and right to the said property, and ordered that it be delivered to an agent of the States, J. B. Van Doyne, for sale.

FIRST POINT.

The first ground of error in the decree, adjudging to the

United States the locomotives and cars, is that the court undertook thereby to adjudicate the question of property as between the United States on one part and the other bondholders on the other part, without any pleadings upon which the decree could be based, and without any such proceedings, however irregular, as would answer the purpose of proper pleadings and process by giving the bondholders an opportunity to litigate the question.

A.

There were no such Pleadings.

The bill as above observed, is brought by the United States praying to have "*all* the property and franchises embraced in the mortgages aforesaid sold for the satisfaction of all the bonds secured," (Rec., p. 5, line 4) and in the amended bill, it is stated that the matter is of common interest and right to all the holders of said bonds who "have a common interest in the matters and things put in litigation, and the relief prayed for in this suit; and that all of said bondholders, 1st and 2d mortgagees, have a common right and interest in said mortgage property described in the said mortgages filed." (Rec., p. 14, *ad fin.*)

The answer of Trimble, appointed to represent the unknown bondholders, admits the facts stated in the bill and amended bill, and joins in the prayer of the bill—as well he might, since the bill and amended bill claimed for the United States no other right than that which they conceeded to all the bondholders.

Upon this state of the pleadings, it was error to decree any preference or priority of any kind in favor of the United States; nor was any such priority or preference given by the original decree.

B.

Nor was there any such stipulation or agreement of parties

as varied the case made in the pleadings and authorized such decree.

The only agreement or stipulation which could be appealed to for that purpose, is that found in the record, p. 12, 13, 22, above referred to.

But who were the parties to this agreement or stipulation, and conceding, *argumenti gratia*, that the proper parties could have thus changed the case at that stage of the proceedings by any stipulation? They were

1. The United States, by James Speed, the attorney, claiming this priority.

2. Mellen, their trustee under the Thornberry mortgage—who however does not appear to have signed the agreement.

3. Husbands, attorney for W. F. Norton and others. Who the "*others*" are does not appear, but Norton himself appears by his answer to be a large bondholder. Rec., p. 16.

4. L. S. Trimble, representing the unnamed bondholders, under an order of the court passed 19th March, 1868, upon the bill which we have seen claimed no priority for the United States, but expressly disclaimed it, an order which purported to have no other object or intent than to bring said unnamed defendants before the court to answer the matter of the bill and amended bill, and conferred no authority upon Trimble in respect of any other matter.

This agreement, therefore, between these parties left wholly unrepresented a large number of bon
ing as well as can be ascertained from the
$[illegible] of principal.

The marshal's report of the sale states incidentally that one Ex. Norton held or represented three-fourths of all the bonds, that was (three-fourths of $400,000) $300,000. The United States held $33,000 and the residue, $67,000

United States the locomotives and cars, is that the court undertook thereby to adjudicate the question of property as between the United States on one part and the other bondholders on the other part, without any pleadings upon which the decree could be based, and without any such proceedings, however irregular, as would answer the purpose of proper pleadings and process by giving the bondholders an opportunity to litigate the question.

A.

There were no such Pleadings.

The bill as above observed, is brought by the United States praying to have "*all* the property and franchises embraced in the mortgages aforesaid sold for the satisfaction of all the bonds secured," (Rec., p. 5, line 4) and in the amended bill, it is stated that the matter is of common interest and right to all the holders of said bonds who "have a common interest in the matters and things put in litigation, and the relief prayed for in this suit; and that all of said bondholders, 1st and 2d mortgagees, have a common right and interest in said mortgage property described in the said mortgages filed." (Rec., p. 14, *ad fin.*)

The answer of Trimble, appointed to represent the unknown bondholders, admits the facts stated in the bill and amended bill, and joins in the prayer of the bill—as well he might, since the bill and amended bill claimed for the United States no other right than that which they conceeded to all the bondholders.

Upon this state of the pleadings, it was error to decree any preference or priority of any kind in favor of the United States; nor was any such priority or preference given by the original decree.

B.

Nor was there any such stipulation or agreement of parties

as varied the case made in the pleadings and authorized such decree.

The only agreement or stipulation which could be appealed to for that purpose, is that found in the record, p. 12, 13, 22, above referred to.

But who were the parties to this agreement or stipulation, and conceding, *argumenti gratia*, that the proper parties could have thus changed the case at that stage of the proceedings by any stipulation? They were

1. The United States, by James Speed, the attorney, claiming this priority.

2. Mellen, their trustee under the Thornberry mortgage—who however does not appear to have signed the agreement.

3. Husbands, attorney for W. F. Norton and others. Who the "*others*" are does not appear, but Norton himself appears by his answer to be a large bondholder. Rec., p. 16.

4. L. S. Trimble, representing the unnamed bondholders, under an order of the court passed 19th March, 1868, upon the bill which we have seen claimed no priority for the United States, but expressly disclaimed it, an order which purported to have no other object or intent than to bring said unnamed defendants before the court to answer the matter of the bill and amended bill, and conferred no authority upon Trimble in respect of any other matter.

This agreement, therefore, between these parties left wholly unrepresented a large number of bondholders, holding as well as can be ascertained from the record, about ~~$333,000~~ 67,000 of principal.

The marshal's report of the sale states incidentally that one Ex. Norton held or represented three-fourths of all the bonds, that was (three-fourths of $400,000) $300,000. The United States held $33,000 and the residue, $67,000

and coupons, must have belonged to the unnamed bondholders.

Yet on this agreement or stipulation only, the court undertook to pass a new decree withdrawing from the operation of the decree regularly made in the cause a large amount of valuable property included in the mortgage and admitted by the stipulation itself to be necessary to pay the motgage bonds.

And it is from this decree which is found in Record p. 25 that this appeal is taken. Record, p. 26.

The question was not one arising under the decree or in the course of distribution ; but it goes back of the decree, and modifies and alters it.

It must be manifest, therefore, that there was error in such a decree because of the insufficiency of the agreement to bind the outstanding parties whom it affected, for this decree took possession of the property in question and applied it to the satisfaction of a claim of the United States, as having an absolute priority over all others.

SECOND POINT.

If we are wrong in both these points and the matter was before the court so that the merits of the case could be decided by it so as to bind all parties, let us see what those merits were.

It may be observed that the property in question was embraced by the two mortgages and by the decree of sale ; although the same might have been acquired by the company after the date of the mortgages. See the mortgages Record, pp. 8 and 11. Such after-acquired property possed by the mortgages (Pennock *vs.* Coe, 23 Howard p. 117.) All the parties and the court considered it so to pass, throughout the proceedings up to and including the original decree.

By the parties to the case subsequently agreed, a question was submitted upon facts which appear in the cause only

by the agreement of the same parties, and these facts are in that agreement stated to be that on January 5th, 1866, a certain agreement was executed by L. S. Trimble, President of the N. O. & O. R. R Co., and thereto fully authorized, of the one part, and the United States of the other part, found in the record p. 12, that the "said agreement has never been legally acknowleged for or recorded in the proper county clerk's office, and that none of said first or second mortgage bondholders, or the N. O. & O. R. R. Co., had notice of said agreement between the N. O. and O. R. R. Co. and the United States, except L. S. Trimble.

The said agreement between the railroad company and the United States, under which the United States claim the property is found at pp. 12, 13 of the record.

It is a bond in the penal sum of $65,000, with a condition underwritten, whereby after reciting that the railroad "has purchased and received, or shall receive from the War Department of the United States, rolling-stock, iron rails, cross-ties, chains, spikes, timber and other materials for repairing and operating its railroad, in quantity and at prices," to be evidenced by receipts given by the railroad company to an officer of the United States upon a credit of 2 years, to be paid in money or in transportation of troops and supplies, and the company desires to secure said payment, it was therefore conditioned that if the railroad company should pay all that was due the United States then the obligation to be void. But if the railroad company failed so to pay, then the obligation to remain in force "to the extent necessary to repay to the United States for the full amount which may be due on account of the said materials so received as aforesaid, and all loss and damage which may have been incurred by the United States by reason of the company's failure to pay for the same, what shall be due thereof when the same shall be due."

"And as a further security for such payment and indemnity to the United States for the full amount which may be due on account of the said material so received as aforesaid, and all loss or damage which may have been incurred by the United States by reason of the said railroad company's failure to pay for the same what shall be due thereof when the same shall be due, and as a further security for such payment and indemnity to the United States, the United States shall have a lien upon the property sold to said company, and in default of such complete and punctual payment of all moneys which may be due on account of the aforesaid purchase of materials, be fully authorized to take possession of and sell said property, and also to place in charge and control of the said company's railroad an agent of the United States, who shall be fully empowered, and by these presents is fully empowered in case of such default as aforesaid, to collect all the revenues of the said company and pay the same to the payment of the United States of all the moneys which shall be due at the times of such application of such revenues to the United States, for any such materials which shall have been delivered by the United States to said railroad company, or by reason of any loss or injury to the United States resulting from such default in payment of the same; and the said company shall have no authority to sell or convey out of its possession, without the consent of the United States first in writing obtained, any of the property referred to in this agreement, but shall hold and retain the same to the exclusive use of said company in carrying on the business of transportation of persons and property over its line of road, until the whole is fully paid for as aforesaid." Rec., p. 13.

The substance of this rather inartificial document is that the United States in the face of these mortgages to secure coupon bonds, passing from hand to hand by de-

livery, sold and delivered to the company certain rolling stock, expressly agreeing that the same might be put upon the road and used in the ordinary way, but reserving to themselves a secret lien upon the same, and stipulating moreover for other security for the payment of the purchase money. The company having the possession and use of this rolling stock, however persons dealing with the bonds secured by the recorded mortgages, had a right, by the consent of the United States, to look to this property as part of their security, nor had they any means of ascertaining that the same was claimed under any superior equity whatever. They dealt in the bonds, believing that this property was pledged for their payment. The decree of the court gave to such persons no opportunity of showing that such was their condition, and that they could not be equitably affected by such secret lien. It proceeded on the ground that the United States had an absolute priority over all bondholders whomsoever.

This was error, for which the decree should be reversed. If it be objected that it does not appear that any or which of the bondholders were in that condition, the answer is that the proceedings were so conducted, and the final decree so made as to afford them no opportunity to set up and maintain their rights; and it is a sufficient ground to reverse the decree that no such opportunity was afforded.

No account was stated between the United States and the railroad company in respect of that purchase of rolling stock and material, but it seems to have been taken for granted that the amount due exceeded the value of the property delivered.

Upon the case stated it was for the United States to show an absolute right as against any claim which could be made consistently with the facts agreed; and it was consistent with those facts that some bondholders had purchased all their bonds after the rolling stock had been

placed upon the road, and in the belief that it was the property of the railroad company.

Certainly an unrecorded mortgage could not prevail against one who had lent money to the company upon the faith of the property which *it had in actual possession by purchase and delivery.*

But the law of Kentucky goes further, and places both prior and subsequent creditors upon an equal footing as to unrecorded mortgages.

The Kentucky statute is found in the revised statutes approved by the legislature of 1851–2, chap. 24, sec. 11, as follows:

"No deed of trust or mortgage conveying a legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration, without notice thereof, or against (any creditor), until such deed shall be acknowledged or proved according to law and lodged for record."

This statute combined the act of 1820, (session acts, p. 114,) and the acts of 1837–39. See *Bank* vs. *Huth*, 4, B. Mon., 450. In construing those acts in reference to an unrecorded deed of trust given by a judgment debtor, the court of appeals of Kentucky said:

"This deed was not proved or acknowledged and deposited in the proper office for record within sixty days, as is required by the statute of 1820, and consequently is legally invalid against any creditor. It can therefore present no legal impediment to the plaintiff's claim, whose intestate was a judgment creditor at and before its execution."

Stephens, adm'r, vs. *Barnett, adm'r,* 7 Dana, 257.

And in *Edwards et al.* vs. *Brenton et al.*, 9 Dana, 69, (A. D. 1839,) the same court said:

"Though the landlord's distress warrant was levied on property not subject to his lien, and only the day after the execution of the deed of trust vesting the title in others,

yet as the deed has neither been recorded nor deposited for registration within the time prescribed by law, it became void as to ~~law~~ him in consequence of the peremptory and unqualified declaration of the statute to that effect."

Thus it seems that the instrument relied on by the United States and upheld by the Circuit Court as giving them an absolute priority over all creditors, antecedent and subsequent, was, by the law of Kentucky, absolutely void as to both classes of creditors, "in consequence of the peremptory and unqualified declaration of the statute to that effect." It is to be observed, that by the recitals in the so called mortgage of January 5, 1866, the said property had been purchased and received from the United States by the railroad company, and the only words that can be relied upon to operate a mortgage, is the agreement that the United States shall have a lien upon the property sold, and upon default of payment be authorized to take possession of and sell said property, Rec., 13, fol. 39, and that in the meantime the said company should have no authority to sell or convey the property out of its possession, without the consent of the United States first in writing obtained, but should use it only in carrying on the business of the road. This may, perhaps, be relied on as ground of an equitable mortgage, but it has strongly the appearance of an attempt to impress upon property actually sold and delivered, conditions in restraint of alienation and ownership inconsistent with the title given by sale and delivery, and so void.

In no view can this instrument be considered as an equitable mortgage reserved on the property sold, because it is a new and distinct agreement embracing other and distinct securities and rights, having no analogy to a vendor's lien or other equitable mortgage. By these provisions the instrument purports to reserve to the company not only a lien upon this particular property sold, but also the right "to place in charge and control of the

company's railroad, an agent of the United States who shall be fully empowered, and by these presents is fully empowered in case of default as aforesaid, to collect *all the revenues* of the said company, and pay the same to the payment of the United States of *all the moneys* which shall be due at the times of such application of such revenues to the United States for and any such materials which shall have been delivered by the United States to the said railroad company, or by reason of any loss or injury to the United States, resulting from such default in payment of the same."

Such provisions are not proper to an equitable mortgage, but to a new and distinct security, with special terms and conditions, which the law of Kentucky, as we have seen, made invalid if unrecorded. It is believed that no instance can be found where an equitable mortgage has been allowed to be set up and enforced to withdraw the assets of the mortgager from the operation of prior perfect mortgage.

Equitable liens of the sort claimed here, as they are applied in case of real estate, proceed upon the idea of a constructive trust affecting the property in the hands of the vendee, but surely there could be no constructive trust to the extent or effect of this alleged agreement. Indeed the case of equitable liens or mortgages is widely different from the present, which is simply that of a special mortgage which was required by law to be recorded, and which the parties have failed to record. Equity can give no relief in such a case, for that would be *pro tanto* to repeal the law.

Conclusion.

Upon the whole, we submit that the decree of the Circuit Court of Kentucky of June 30, 1869, ought to be reversed, and the property in question ought to be decreed to be sold under the former decree of November 13, 1868.

J. M. CARLISLE,
J. D. McPHERSON,
For Appellants.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE NEW ORLEANS AND OHIO RAILROAD COMPANY, L. S. TRIMBLE, *et. al.*, *Appellants*,
vs.
W. P. MELLEN AND THE UNITED STATES, *Appellees.*
No. 202.

Appeal from the Circuit Court of the United States for the Kentucky District.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE NEW ORLEANS AND OHIO RAILROAD COMPANY, L. S. TRIMBLE, *et. al.*, *Appellants*,
vs.
W. P. MELLEN AND THE UNITED STATES, *Appellees.*
No. 202.

Appeal from the Circuit Court of the United States for the Kentucky District.

BRIEF FOR THE UNITED STATES

This appeal was prayed and is prosecuted by L. S. Trimble and W. F. Norton, representing the holders of the mortgage bonds of the New Orleans and Ohio Railroad Company, (Pr. Rec., 26,) and is from a decree rendered on the 30th day of June, 1869, (Pr. Rec., 25.) This decree purports, on its face, to have been rendered upon the "agreed facts" submitted by the parties. (Pr. Rec., 22.)

The decree adjudges that the United States has the superior equity and right to the property described in said agreed case, to wit, two locomotives, Nos. 15 and 152, and nine box cars, and one stock car, and orders

the defendant, the New Orleans and Ohio Railroad Company, to deliver the said property to J. B. Van Dyne, an agent of the War Department, for sale, and when sold, the proceeds to be entered as a credit on the bond of said company of date January 5, 1866, (Pr. Rec., 12.) The decree concludes in these words: "Such is the decree agreed betwixt the *parties* in the event the court considered the Government having the superior equity to said property."

The entire proceedings in the circuit court appear to have been conducted by consent of parties. The first decree in the cause of the 13th day of November, 1868, (Pr. Rec., 19,) was rendered by consent. The marshal was directed to sell the mortgaged property for one-fourth cash in hand, and the balance to be paid in two equal parts at six and twelve months, such deferred payments to be secured by bonds from the purchaser, with surety and a lien retained on the property. No distribution was decreed, and the court expressly reserved, for future adjudication, all questions not therein adjusted.

On the 25th day of March, 1869, the marshal filed his report of sale, (Pr. Rec., 23,) wherein he states that he did not sell the two locomotives, Nos. 15 and 152, nine box cars, and one stock car, for the reason that he was instructed not to sell them, by the attorney for the United States and others, and by the attorney for the New Orleans and Ohio Railroad.

This report was received without objection, and "no

exception having been filed to said sale or report, it is, therefore, ordered and adjudged by the court that said sale and report be, and the same are, now confirmed, and said report is ordered to be recorded."

I.

The first matter of controversy that arose in this case is the one set out in the agreed statement of facts. It is obvious that this mode of procedure was adopted by *all* the parties, through their counsel, in lieu of the pleadings, which would otherwise have been necessary to bring this question before the court. The court still had jurisdiction of the whole case, and the precise question submitted to the court, by the written stipulation of the parties, might have been made by supplemental pleadings. That it was competent for the parties to pursue this course seems to admit of no doubt. The decree rendered upon this agreed statement of facts is precisely what the parties agreed should be done "in the event the court considered the Government having the superior equity to said property." No objection was taken to the mode of procedure in the circuit court, and the parties having voluntarily adopted it, their objection made here, for the first time, should not be entertained.

Laber *vs.* Cooper, 7 Wall., 570.

Houghton *vs.* Jones, 1 Wall., 705.

Washington Railroad *vs.* Bradleys, 10 Wall., 300.

This appeal is prosecuted by parties who signed the

stipulation and submitted the agreed case to the court. Surely they cannot be heard to complain of the supposed want of regularity in this proceeding.

II.

The first mortgage executed by the New Orleans and Ohio Railroad Company bears date the 22d day of March, 1858, and was acknowledged by the president of the company on the 26th day of the same month. (Pr. Rec., pp. 6 and 9.)

The second bears date April 1, 1860, and was acknowledged on the 26th day of July, 1860. (Pr. Rec., pp. 9 and 11.)

The written agreement or mortgage, under which the railroad company came into possession of the two locomotives and ten cars in controversy, was executed on the fifth day of January, 1866. (Pr. Rec., p. 12.)

This property was not in the possession of the railroad company until long after the execution of the first and second mortgages executed by the company to secure the payment of its bonds, so that the only foundation for the claim of the appellees is to be found in the following clause, which occurs in each of said mortgages, viz: "And it is expressly understood that the conveyance made by this indenture is on and for the present rights, interests, and property, and in *the future acquired personal property, rights, and appurtenances of the party of the first part.*"

Since the decision of this court in Pennock *et al. vs.*

Coe, (23 How., 124,) that a mortgagee may take an equitable interest in property acquired by the mortgagor, after the execution of the mortgage, is a proposition not to be doubted; but it cannot be said, either upon principle or on the authority of that case, that such interest attaches *before* the property is acquired by the mortgagor. On the contrary, the court in that case recognized and approved the maxim, that "a person cannot grant a thing which he has not: *Ille non habet non dat.*" And this is true both at law and in equity. In the case just cited, Mr. Justice Nelson said: "The inquiry here is, not whether a person can grant, *in presenti*, property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor in fulfilment of an express agreement founded on a good and valuable consideration, and this when no rule of law is infringed or *rights of a third party prejudiced.*"

Besides, in that case, one of the covenants was, that the money received for the bonds, for the security of which the mortgage was given, should be faithfully applied to the building and equipment of the road, and the court laid great stress on this fact. The deeds of trust in this case contain no such covenant. In that case the money of the bondholders went into the road, and, as is fairly inferable from the case, was used in the purchase of the rolling stock on which the execution was levied. In this case it is certain that no part of

the money of the bondholders was used in the purchase of the property in controversy. In Pennock's case, the construction and effect given to the mortgage by the court were strongly supported by the equities of the case, which have no existence in this case. When the New Orleans and Ohio Railroad Company received the rolling stock mentioned in the decree of June 30, 1869, it took the property subject to the terms of the writing signed by the president, and the bondholders could not take any greater right, in virtue of their mortgage, than the railroad company itself holds.

In Holroyd *vs.* Marshall, 10 House of Lords Cases, 209, the Lord Chancellor says: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he recives the consideration for the contract, and, afterwards, becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser *immediately on the property being acquired.* This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then *immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract.*"

This is the utmost extent to which the doctrine has been

carried in England or in this country. The lien given to the United States by the writing executed by the president of the New Orleans and Ohio Railroad Company at the time of receiving the rolling stock in question, was certainly good as between the parties thereto. And to require the company, after receiving property in this way, without payment of any part of the purchase-money, to renounce or repudiate its agreement with the vendor, and hold the property in trust for the bondholders, would be doing violence to well-known equitable principles. Authority for such a proceeding cannot be derived from either of the cases hereinbefore cited. The most that can be claimed for a mortgagee under such deeds as those relied on in this case, is that he has an equitable lien on the property purchased by the mortgagor, *when the latter receives possession as owner*. In this case the company took the property subject to the lien of the United States, and any right in or to it which passed to the bondholders passed subject to the same lien. The mortgages did not convey to the mortgagees any greater right than the company had. The mortgagees do not occupy the position of *bona fide* purchasers for value, nor even of mortgagees for a present consideration. They have nothing but a naked equity, and that posterior in time and conscience to the equity of the United States. "*Qui prior est tempore potior est jure.*"

Nor does the statute of Kentucky, cited on the brief of learned counsel for appellants, take the case out of the operation of this rule. It is insisted, on the part of appellants, that the appellees can have no lien under the instrument af January 5, 1866, because the same was not ac-

knowledged or proved according to law, and lodged for record. It is a sufficient answer to this objection to the claim of the United States, to say that this is not a contest between the holder of an equity, and the holder of the legal title coupled with an equity; nor is it a case of one creditor seeking to reach a fund in the hands of another, nor yet of a purchaser for present value, and without notice, seeking to subject property as against a mortgagee under an unrecorded mortgage. It is purely a case of one equity against another, neither having the legal title, and neither being in possession. The legal title is in a naked trustee, a mere stakeholder. The rights of neither party could be asserted in a court of law. In such a case, the party coming into a court of equity to assert his rights, must be required to do equity. It was not intended that this statute relative to the recording of deeds of trust and mortgages should be subversive of the general principles of equity. Bank of Kentucky *vs.* Vance, 4 Littell, 173.

The cases cited from the Kentucky Reports by learned counsel for appellants are cases of judgment creditors asserting their rights against parties claiming under unrecorded deeds or mortgages. There can be no doubt of the applicability or effect of the statute in such cases. But to give the statute the same operation in this case would produce results such as the legislature never intended. The Court of Appeals of Kentucky has never applied the statute in a case like this. The words "any creditor," used in the statute, mean a creditor who has an interest in or right to the thing attempted to be conveyed, and can have no application where all the parties are asserting mere equities, and are in a court of equity seeking its aid on equitable principles.

Swigert *vs.* Bank, 17 B. Monroe, 289, 290.
Bailey, &c., *vs.* Welch, &c., 4 B. Monroe, 244.

B. H. BRISTOW,
Solicitor General.